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In the Supreme Court of the United States

OCTOBER TERM, 1985

JAMES KIRKLAND BATSON, PETITIONER

v.

COMMONWEALTH OF KENTUCKY

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING AFFIRMANCE

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QUESTION PRESENTED

Whether judicial supervision of the prosecution's peremptory challenges is constitutionally required where a defendant's claim of racially-based exclusion is predicated only on the exercise of peremptory challenges in his own case.

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INTEREST OF THE UNITED STATES

Because Federal Rule of Criminal Procedure 24(b) grants peremptory challenges to both the prosecution and the defense in federal criminal trials,[1] the resolution of the question presented here will affect federal criminal prosecutions. In addition, unlawful racially motivated exclusion of any person from jury service is a criminal offense under the laws of the United States. 18 U.S.C. 243. Accordingly, the United States has an important interest in assuring that a proper accommodation continues to be made between the policies prohibiting un-

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[1] Ordinarily the prosecution is entitled to 6 peremptory challenges and the defense to 10. If the offenses charged carry a maximum penalty of a fine and/or one year's imprisonment, each side receives only three challenges. In any capital case each side receives 20 peremptories. The district court is also vested with discretion to allow extra peremptories to the defense in a multi-defendant trial and to determine whether defense peremptories should be exercised separately or jointly. Fed. R. Crim. P. 24(b). Rule 24(c) allows limited peremptory challenges to alternate jurors.

lawful racial discrimination and the values advanced by the traditional operation of the peremptory challenge system in the context of the right to a jury trial.

STATEMENT

Following a jury trial in the Circuit Court of Jefferson County, Kentucky, petitioner, a black male, was convicted of second degree burglary, in violation of Ky. Rev. Stat. § 511.030 (1985), and receiving stolen property with a value greater than $100.00, in violation of Ky. Rev. Stat. § 514.110 (1985). Petitioner was sentenced as a persistent felony offender to a term of imprisonment of 20 years. The Supreme Court of Kentucky affirmed. Pet. App. 1-6, 7-9.

1. The evidence at trial is briefly summarized in the opinion of the Supreme Court of Kentucky (Pet. App. 1-2). A victim of the burglary identified petitioner as the intruder she saw in her home taking several purses. A neighbor of the burglary victims also testified that on the day of the burglary she had observed petitioner standing near the home burglarized and later saw him running away from the back of the house. Other evidence showed that petitioner and a co-defendant subsequently pawned two rings belonging to the burglary victims.

2. Under the Kentucky Rules of Criminal Procedure challenges for cause are made, first by the prosecution and then by the defense. After voir dire has been completed, challenges for cause have been exercised, and a sufficient number of prospective jurors have been qualified, each side is given a list of the qualified jurors equal to the number of jurors to be seated plus the total number of peremptory challenges allowed to all parties. Peremptory challenges are then exercised "simultaneously" by each party striking names from the list and returning it to the trial judge. If the offense charged is a felony, the state is entitled to five peremptory challenges and the defendant or defendants jointly are entitled to eight peremptory challenges. If alternative jurors are to be selected, each side is allowed one additional peremptory challenge. If this winnowing process yields sur-

plus jurors the actual jury members are chosen by a random drawing. Ky. R. Crim. P. 9.36, 9.40.

In the instant case, the parties exercised their peremptory challenges and a jury panel was seated.[2] Petitioner thereupon moved to discharge the panel because the prosecutor used four of his six peremptory challenges to strike black prospective jurors, leaving an all white jury panel.[3] Invoking the Sixth and Fourteenth Amendments, petitioner contended that he was denied his right to equal protection of the laws and to "an impartial trial, [by] a cross-section of the community" (Pet. App. 15). The trial court denied the motion on the ground that "[a]nybody can strike anybody they want to" (*id.* at 16), and indicated (*id.* at 17) that the actual composition of the trial jury, as opposed to the venire from which it was drawn, is not subject to scrutiny under the fair cross-section doctrine.

On appeal, petitioner contended that the prosecutor's use of peremptory challenges against blacks had deprived him of an impartial jury and of a trial by persons representing a fair cross section of the community. He conceded that in *Swain* v. *Alabama*, 380 U.S. 202 (1965), this Court had rejected the claim that prosecutorial use of peremptory challenges to strike black prospective jurors in a particular case, by itself, violates equal protection. He argued, however, that this Court had not addressed the continuing vitality of *Swain* following the

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[2] Following the exercise of peremptory challenges the jury panel and alternate juror selected were called by name by the court and directed to assume their places in the jury box. Pet. App. 14. The jury was then sworn and the court addressed the other prospective jurors as follows (Pet. App. 18):

> Now, all the jurors that have not been selected for one reason or another, I appreciate your being over here. We always have to have a panel large enough to select the twelve or thirteen that try the case.
>
> Thank you very much. You can go back to the Jury Pool and maybe you can pick up another case in there.

[3] It appears (see Pet. App. 14) that all peremptory challenges were exercised.

application of the Sixth Amendment to the states in *Duncan* v. *Louisiana*, 391 U.S. 145 (1968), and the Court's ruling, in *Taylor* v. *Louisiana*, 419 U.S. 522 (1975), that the Sixth Amendment contemplates a jury drawn from a fair cross-section of the community. In addition, relying on *People* v. *Wheeler*, 22 Cal. 3d 258, 583 P.2d 748, 148 Cal. Rptr. 890 (1978), and *Commonwealth* v. *Soares*, 377 Mass. 461, 387 N.E.2d 499, cert. denied, 444 U.S. 881 (1979), petitioner urged the Kentucky court to depart from *Swain* as a matter of state law. In sum, even though he had presented no evidence reflecting a pattern of use of prosecutorial peremptory challenges to strike black prospective jurors, petitioner asserted that the prosecutor's challenge to all of the black prospective jurors in his case created a sufficient indication that the challenges had been exercised solely on the basis of race to require a hearing as to whether the prosecutor had exercised his peremptory challenges for an invalid racially-exclusionary purpose (Pet. App. 10-13).

The Supreme Court of Kentucky affirmed petitioner's conviction, rejecting his jury discrimination claim. The court declined to depart from the *Swain* rule, holding that "an allegation of the lack of a fair cross-section jury which does not concern a systematic exclusion from the jury drum does not rise to constitutional proportions" (Pet. App. 5).

SUMMARY OF ARGUMENT

At issue in this case is the continuing vitality of *Swain* v. *Alabama*, 380 U.S. 202 (1965). *Swain* held that, in light of the historical status of peremptory challenges as an integral part of a criminal jury trial, and the valuable role played by such challenges in guarding against bias among jurors, a prosecutor's use of his peremptory challenges to strike back veniremen in a particular case does not establish a prima facie case of denial of equal protection of the laws to a black defendant. Strong dictum in *Swain*, on the other hand, indi-

cates that peremptory challenges may not be used to deny black citizens the opportunity to participate as equals in the administration of the criminal justice system by prosecutors consistently challenging black veniremen wholly without regard to the particular circumstances of each particular case. This seems to us to draw the line in just the right place, distinguishing in as efficient and administrable a way as possible between permissible peremptory challenges based on the prosecutor's belief—however subjective—that an individual juror will be predisposed against the government's case in a particular criminal trial, and impermissible challenges based on racial prejudice.

Contrary to the view of petitioner, nothing in this Court's decisions recognizing a qualified Sixth Amendment right to a jury *drawn from* a fair cross-section of the community requires reconsideration of *Swain*. First, *Taylor* v. *Louisiana*, 419 U.S. 522 (1975), makes clear that the fair cross-section doctrine applies only to jury venires and lists, and not to actual petit juries chosen from them. But even if the rule were otherwise, the fair cross-section cases would not require revision of the *Swain* rule, because even as applied to jury venires, they prohibit only systematic exclusion as reflected in a consistent pattern of underrepresentation.

Second, the fair cross-section doctrine is but one facet of the historical jury trial right secured by the Sixth Amendment. As the Court made clear in *Williams* v. *Florida*, 399 U.S. 78, 102 (1970), the free availability of peremptory challenges is an integral feature of the criminal jury trial that coexists with the fair cross-section doctrine under the Sixth Amendment. Indeed, the historical and functional justifications for relatively unfettered peremptory challenges rehearsed in *Swain* are precisely the kind of significant state interest that would overcome any fair cross-section doctrine objection, if otherwise applicable. See *Duren* v. *Missouri*, 439 U.S. 357, 367-368 (1979).

Nor does the availability of peremptory challenges render the fair cross-section right applicable to the venire meaningless. A competent prosecutor must husband peremptory challenges to strike those jurors most likely disposed not to give the government's case a fair hearing. A prosecutor who permits himself to act on the basis of racial prejudice is likely to forgo the most effective use of his peremptory challenges, and also runs the risk of creating a record of consistent exclusion of black veniremen that may provoke judicial oversight under *Swain*.

In our judgment, other criticisms of *Swain* that have frequently been voiced are also unpersuasive. *Swain* follows, rather than departs from, established equal protection doctrine in requiring proof of consistent or systematic discrimination as part of a defendant's prima facie case. This is simply a reflection of the elevated standard of proof required when an impermissible racially discriminatory *purpose* is to be inferred from evidence of statistical underrepresentation. We are similarly unpersuaded that *Swain* imposes an unduly difficult burden on defendants seeking to prove systematic exclusion. If the pernicious practice of racially-motivated exclusion in fact prevails in some jurisdictions, public defenders' offices and organizations of defense counsel could relatively easily keep the records necessary to make the required proof. Finally, we cannot agree that *Swain* rests on the objectionable premise that for members of a racial minority, considerations of racial solidarity, rather than of fair consideration of evidence, will determine a verdict. Rather *Swain* simply rests on the assumption that, given the limited information available to litigants upon which to exercise peremptory challenges, the possibility that a prosecutor has been influenced in his challenges by a common group identity of any sort is insufficient to create a prima facie case of unlawful intentional discrimination.

ARGUMENT

PETITIONER DID NOT ESTABLISH THAT HE WAS DEPRIVED OF A PROPERLY CONSTITUTED PETIT JURY OR DENIED EQUAL PROTECTION OF THE LAWS

A. Under *Swain* v. *Alabama* A Defendant Cannot Establish An Equal Protection Violation By Showing Only That Black Veniremen Were Subjected To Peremptory Challenge By The Prosecution In His Case

In *Swain* v. *Alabama*, 380 U.S. at 209-222, this Court held that a prosecutor's striking of all of the black prospective jurors from the petit jury venire in a given case by exercise of peremptory challenges did not deprive the black defendant of the equal protection of the laws. At the same time, the Court strongly suggested that it would be constitutionally impermissible for a prosecutor to employ peremptory challenges systematically and consistently to prevent blacks from serving on petit juries, wholly without regard to circumstances of the particular case, with the result that blacks are denied "the same right and opportunity to participate in the administration of justice enjoyed by the white population" (*id.* at 224). Because the record of the case was considered insufficient to demonstrate that the prosecution had behaved in the fashion that the Court identified as suspect, however, the Court found it unnecessary conclusively to decide whether "a State's systematic striking of Negroes in the selection of petit juries raises a prima facie case under the Fourteenth Amendment" (*ibid.*).

No Member of the Court disagreed with the rule that the striking of black prospective jurors in a particular case cannot alone make out a prima facie violation of the Equal Protection Clause. Justice Goldberg, joined by Chief Justice Warren and Justice Douglas in dissent, differed with the majority only as to whether the record established a prima facie case of systematic exclusion of blacks from jury service that shifted the bu den to the State to establish the legitimacy of its practices. See 380

U.S. at 231-242.[4] Indeed, the dissenting Justices made clear that they did not contemplate that "a prosecutor's motives [be] subject to question or judicial inquiry when he excludes Negroes or any other group from sitting on a jury in a particular case" (*id.* at 245). Rather (*ibid.*),

> [o]nly where systematic exclusion has been shown, would the State be called upon to justify its use of peremptories or to negative the State's involvement in discriminatory jury selection.[5]

The Court's ruling in *Swain* was based on an analysis of the history and function of the peremptory challenge system. The institution was traced to near the inception of the jury trial system in England (380 U.S. at 212-213), and was part of "the settled law of England" at the time of "the separation of the Colonies" (*id.* at 213). The peremptory challenge system was early received into federal and state criminal practice from the common law, and frequently was addressed by statutory enactments.

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[4] The nub of the disagreement between the Court and the dissent in *Swain* concerned whether a showing that black persons had not served as jurors over a period of time was sufficient to shift the burden of justification to the prosecution, where the defendant had not established that the elimination of black jurors in past cases was attributable to the *prosecution's* strikes. Compare 380 U.S. at 224-228 with *id.* at 237-241 (Goldberg, J., dissenting).

[5] The dissenting Justices' understanding of "systematic exclusion" in this context is reflected in the statement that they would have found a prima facie case of exclusion of black jurors from service based on proof that "Negroes constitute a substantial segment of the population, that Negroes are qualified to serve as jurors, and that none or only a token number has served on juries *over an extended period of time*" (380 U.S. at 244-245 (emphasis added; footnote omitted)).

The dissenting Justices' concurrence in the general rule announced in *Swain* is also reflected in their statement (380 U.S. at 245 (emphasis added)) that

> the State wholly fails to meet the prima facie case of systematic and purposeful racial discrimination by showing that it has been accomplished by the use of a peremptory challenge system unless the State also shows that it is not involved in the misuse of such a system *to prevent all Negroes from ever sitting on a jury.*

Id. at 214-218. The Court observed (*id.* at 219) that "[t]he persistence of peremptories and their extensive use demonstrated the long and widely held belief that peremptory challenge is a necessary part of trial by jury." And the Court characterized the availability of peremptory challenges as " 'one of the most important of the rights secured to the accused' " (*ibid.*, quoting *Pointer* v. *United States*, 151 U.S. 396, 408 (1894)).

The Court explained that the peremptory challenge " 'is, as Blackstone says, an arbitrary and capricious right; and it must be exercised with full freedom, or it fails of its full purpose.' " 380 U.S. at 219 (quoting *Lewis* v. *United States*, 146 U.S. 370, 378 (1892)). Allowing the parties, both prosecution and defense, to exercise a challenge to prospective jurors "without a reason stated, without inquiry and without being subject to the court's control" (380 U.S. at 220), serves to "eliminate extremes of partiality on both sides" and to "assure the parties that the jurors before whom they try the case will decide on the basis of the evidence placed before them and not otherwise" (*id.* at 219). The peremptory challenge rests, in part, on the recognition that a safeguard is needed to supplement challenges for cause, which require proof of a degree of partiality of a kind or degree that may not be readily demonstrable. *Id.* at 220. Peremptory challenges may be exercised, inter alia, on the basis of hunches, reactions to a prospective juror's answers and demeanor during voir dire, and other kinds of fleeing insight or speculative inference by counsel. *Ibid.*

The Court also recognized that peremptory challenges are (380 U.S. at 220-222 (footnotes omitted)):

> no less frequently exercised on grounds normally thought irrelevant to legal proceedings or official action, namely, the race, religion, nationality, occupation or affiliations of people summoned for jury duty. For the question a prosecutor or defense counsel must decide is not whether a juror of a particular race or nationality is in fact partial, but whether one from a different group is less likely to be.

The Court explained that given the "limited knowledge counsel has of them," veniremen "are not always judged solely as individuals for the purpose of exercising peremptory challenges," but may be challenged for reasons "which may include their group affiliation, in the context of the case to be tried." *Id.* at 221. Thus, "[i]n the quest for an impartial and qualified jury, Negro and white, Protestant and Catholic, are alike subject to being challenged without cause," just as are "accountants or those with blue eyes" (*id.* at 212, 221).[6]

The Court concluded (*id.* at 222):

> In the light of the purpose of the peremptory system and the function it serves in a pluralistic society in connection with the institution of jury trial, we cannot hold that the Constitution requires an examination of the prosecutor's reasons for the exercise of his challenges in any given case. The presumption in any particular case must be that the prosecutor is using the State's challenges to obtain a fair and impartial jury to try the case before the court. The presumption is not overcome and the prosecutor therefore subjected to examination by allegations that in the case at hand all Negroes were removed from the jury or that they were removed because they were Negroes. Any other result, we think, would establish a rule wholly at odds with the peremptory challenge system as we know it.[7]

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[6] Only by means of individual questioning, resulting in much more protracted voir dire proceedings than are now commonplace, could the litigants base peremptory challenges on criteria other than a person's appearance and group characteristics (including such non-racial group characteristics as age, sex, occupation, education background, etc.).

[7] The Court elaborated (380 U.S. at 222):

> The challenge, *pro tanto*, would no longer be peremptory, each and every challenge being open to examination, either at the time of the challenge or at a hearing afterwards. The prosecutor's judgment underlying each challenge would be subject to scrutiny for reasonableness and sincerity. And a great many uses of the challenge would be banned.

In Part III of the Court's opinion the Court turned to *Swain*'s assertion that "there ha[d] never been a Negro on a petit jury in either a civil or criminal case in Talladega County and that in criminal cases prosecutors have consistently and systematically exercised their strikes to prevent any and all Negroes on petit jury venires from serving on the petit jury itself" (380 U.S. at 223). As indicated above, the Court ultimately concluded that the record did not sufficiently support this claim to require its definitive resolution. But the Court tentatively suggested an important distinction raised by the broad claim advanced in *Swain*. On the one hand, the Court had in *Swain* decided "that it is permissible to insulate from inquiry the removal of Negroes from a particular jury on the assumption that the prosecutor is acting on acceptable considerations related to the case he is trying, the particular defendant involved and the particular crime charged" (*ibid.*). On the other hand, the equal protection claim was seen to take on "added significance" when "the prosecutor in a county, in case after case, whatever the circumstances, whatever the crime and whoever the defendant or victim may be" removes black jurors by peremptory challenge, "with the result that no Negroes ever serve on petit juries." *Ibid.* The Court added (*id.* at 224 (emphasis added)):

> If the State has not seen fit to leave a single Negro on any jury in a criminal case, the presumption protecting the prosecutor may well be overcome. *Such proof might support a reasonable inference that Negroes are excluded from juries for reasons wholly unrelated to the outcome of the particular case on trial and that the peremptory system is being used to deny the Negro the same right and opportunity to participate in the administration of justice enjoyed by the white population.* These ends the peremptory challenge is not designed to facilitate or justify.

In the present case, petitioner's challenge was based entirely on the prosecution's exercise of its peremptory challenges in the particular case. See pages 3-4, *supra*.

There is no suggestion in the record that the prosecution generally struck black prospective jurors in criminal trials when the defendant was black, much less that the prosecutor habitually struck black jurors regardless of the circumstances of the particular case, so as to deny black citizens the opportunity to participate as jurors in the operation of the criminal justice system. Accordingly, *Swain* is controlling here unless it is to be overruled. Because the basis most commonly cited for doing just that (see, *e.g.*, Pet. 4-5) lies in this Court's Sixth Amendment jurisprudence developed subsequently to *Swain*, we turn to those cases before addressing directly the arguments made for abandoning *Swain*.

B. A Prosecutor's Consideration Of The Group Identity Of Veniremen In Exercising Peremptory Challenges, In The Manner Permitted By *Swain*, Does Not Violate The Sixth Amendment Fair Cross-Section Principle Recognized By This Court

1. The Sixth Amendment provides in pertinent part that in federal criminal prosecutions "the accused shall enjoy the right to a speedy and public trial *by an impartial jury*" (emphasis added). In *Duncan* v. *Louisiana*, 391 U.S. 145 (1968), this Court held that the Sixth Amendment right to trial by jury is made applicable to state criminal trials by the Fourteenth Amendment. Then, in *Taylor* v. *Louisiana*, 419 U.S. 522, 526 (1975), the Court made explicit what was implicit in prior decisions: that "the presence of a fair cross-section of the community on venires, panels, or lists from which petit juries are drawn is essential to the fulfillment of the Sixth Amendment's guarantee of an impartial jury trial in criminal prosecutions". In reaching this result, the Court considered prior decisions under the Sixth and Fourteenth Amendments and the Court's supervisory power, the language and legislative history of the federal Jury Selection and Service Act of 1968, 28 U.S.C. 1861 *et seq.* (419 U.S. at 526-530), and the function served by the institution of trial by jury: "to guard against the exercise of arbitrary power—to make available the com-

monsense judgment of the community as a hedge against the overzealous or mistaken prosecutor and in preference to the professional or perhaps over conditioned or biased response of a judge" (*id.* at 530). And the Court concluded that "[t]his prophylatic vehicle is not provided if the jury pool is made up of only special segments of the populace or if large, distinctive groups are excluded from the pool" (*ibid.*).

At the same time, the Court in *Taylor* made clear the limits of its holding, deliberately preserving the outlines of preexisting doctrines allowing substantial latitude in jury selection procedures. The Court emphasized that the "fair-cross-section principle must have much leeway in application" (419 U.S. at 538), and explicitly reaffirmed (*ibid.*):

> [W]e impose no requirement that petit juries actually chosen must mirror the community and reflect the various distinctive groups in the population. Defendants are not entitled to a jury of any particular composition, *Fay* v. *New York*, 322 U.S. 261, 284 (1947); *Apodaca* v. *Oregon*, 406 U.S. [404,] 413 [(1972)] (plurality opinion); but the jury wheels, pools of names, panels or venires from which juries are drawn must not systematically exclude distinctive groups in the community and thereby fail to be reasonably representative thereof.

In *Taylor*, the Court held that a state law excluding any woman from consideration for jury service unless she had filed a written statement volunteering for such service that had resulted in gross underrepresentation of women in the jury service wheel was inconsistent with the Sixth Amendment. Subsequently, in *Duren* v. *Missouri*, 439 U.S. 357 (1979), the Court held that a state law that provided an automatic exemption to women seeking to be excused from jury service, which had produced similar underrepresentation in jury venires, was similarly invalid. In *Duren*, the Court summarized the elements of a criminal defendant's prima facie showing of a violation of the fair cross-section requirement. A defendant must show (439 U.S. at 364):

> (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury selection process.

Even when a defendant makes out the required showing of "systematic disproportion" (439 U.S. at 368 n.26), the State remains free to adduce "adequate justification for this infringement" (*ibid.*) by demonstrating that "a significant state interest" is served by "those aspects of the jury-selection process * * * that result in the disproportionate exclusion of a distinctive group" (*id.* at 367-368 (footnote omitted)).

2. The courts of appeals have generally concluded that *Taylor* and the fair cross-section requirement do not impair the authority of *Swain*, and that, even under a Sixth Amendment theory, a defendant complaining of prosecutorial use of peremptory challenges must establish that strikes in his particular case are part of a pattern of systematic exclusion. At least five circuits have explicitly rejected Sixth Amendment claims.[8] State courts generally have taken a similar view of the bearing

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[8] See *Grigsby* v. *Mabry*, 758 F.2d 226, 230 (8th Cir. 1985) (en banc); *United States ex rel. Palmer* v. *DeRobertis*, 738 F.2d 168, 172 (7th Cir. 1984); *United States* v. *Clark*, 737 F.2d 679, 681-682 (7th Cir. 1984); *United States* v. *Thompson*, 730 F.2d 82, 85 (8th Cir. 1984), cert. denied, No. 83-6809 (Nov. 13, 1984); *Willis* v. *Zant*, 720 F.2d 1212, 1219 n.14 (11th Cir. 1983), cert. denied, No. 83-1558 (June 18, 1984); *United States* v. *Whitfield*, 715 F.2d 145, 146-147 (4th Cir. 1983); *United States* v. *Childress*, 715 F.2d 1313, 1321 (8th Cir. 1983) (en banc), cert. denied, No. 83-5659 (Jan. 9, 1984); *Weathersby* v. *Morris*, 708 F.2d 1493, 1497 (9th Cir. 1983), cert. denied, 464 U.S. 1046 (1984). In at least two other circuits, the continuing vitality of *Swain* has recently been reaffirmed without explicit reference to the fair cross-section doctrine. See *United States* v. *Canel*, 708 F.2d 894, 898 (3d Cir.), cert. denied, 464 U.S. 852 (1983); *United States* v. *Jenkins*, 701 F.2d 850, 859-860 (10th Cir. 1983).

of the Sixth Amendment fair cross-section principle on claims of discriminatory use of peremptory challenges.[9]

However, beginning with *People* v. *Wheeler*, 22 Cal. 3d 258, 583 P.2d 748, 148 Cal. Rptr. 890 (1978), a case where the state exercised more than 20 peremptory challenges, and *Commonwealth* v. *Soares*, 377 Mass. 461, 387 N.E.2d 499, cert. denied, 444 U.S. 881 (1979), a case where the state exercised 48 peremptory challenges, some state courts, *acting on the basis of state law*, have held that the use of peremptory challenges to remove prospective jurors possessing particular group characteristics in a single case may violate a defendant's right to a jury drawn from a representative cross section of the community. See also *State* v. *Crespin*, 94 N.M. 486, 489, 612 P.2d 716, 718 (Ct. App. 1980); *State* v. *Neil*, 457 So. 2d 481 (Fla. 1984); *State* v. *Gilmore*, 199 N.J. Super. 389, 489 A.2d 1175 (1985).

More recently, in *McCray* v. *Abrams*, 750 F.2d 1113 (1984), petition for cert. pending, No. 84-1426, a divided panel of the Second Circuit held that the Sixth Amendment authorizes a defendant to challenge prosecutorial peremptory challenges whenever, in a given case, the defendant can show that there is a "substantial likelihood that the challenges leading to [exclusion of venire members of a given cognizable group in the community] have been made on the basis of the individual venire persons' group affiliation" (750 F.2d at 1131-1132). And in *United States* v. *Leslie*, 759 F.2d 366, 374 (1985), a divided panel of the Fifth Circuit held that, in federal criminal prosecutions, "[i]f the defendant timely objects, the district court must exercise its supervisory authority

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[9] See, *e.g.*, *People* v. *Williams*, 97 Ill. 2d 252, 454 N.E.2d 220 (1983), cert. denied, No. 83-5785 (May 14, 1984); *People* v. *McCray*, 57 N.Y.2d 542, 443 N.E.2d 915 (1982), cert. denied, 461 U.S. 960 (1983); *Belino* v. *State*, 465 So. 2d 1043 (Miss. 1985); *State* v. *Wiley*, 698 P.2d 1244 (Ariz. 1985); *Nevius* v. *State*, 699 P.2d 1053 (Nev. 1985); *Commonwealth* v. *Henderson*, 497 Pa. 23 (1981), 438 A.2d 951; *State* v. *Grady*, 93 Wis. 2d 1, 286 N.W.2d 607 (1979).

to determine whether the prosecutor has considered the veniremen's race in employing his peremptory challenges, and if so whether his consideration of race in that case was justifiable." (The Fifth Circuit subsequently decided, sua sponte, to reconsider *Leslie* en banc.)

These recent cases represent a significant departure from *Swain*. For instance, under *Wheeler*, a defendant makes out a prima facie case by showing that most or all of the black members of a venire in the given case have been challenged by the prosecution. See also *McCray*, 750 F.2d at 1131-1132, 1133. The burden then shifts to the prosecution to justify its use of peremptory challenges on specific grounds relevant to the case being tried. The grounds offered need not, however, rise to the level that would justify a challenge for cause. *Wheeler*, 22 Cal. 3d at 281-283, 583 P.2d at 764-766, 148 Cal. Rptr. at 906-907; *McCray*, 750 F.2d at 1132. The required justification has been elaborated in *People* v. *Hall*, 35 Cal. 3d 161, 167-168, 672 P.2d 854, 858, 197 Cal. Rptr. 71, 75 (1983) (citation omitted; emphasis in original):

> [O]nce a prima facie case of group bias appears the allegedly offending party [is] required to come forward with explanation to the court that demonstrates other bases for the challenges, *and* the court [must] satisfy itself that the explanation is genuine. This demands of the trial judge a sincere and reasoned attempt to evaluate the prosecutor's explanation in light of the circumstances of the case as then known, his knowledge of trial techniques, and his observations of the manner in which the prosecutor has examined members of the venire and has exercised challenges for cause or peremptorily, for "we rely on the good judgment of the trial courts to distinguish bona fide reasons for such peremptories from sham excuses belatedly contrived to avoid admitting acts of group discrimination."

See also *McCray*, 750 F.2d at 1132. Those state courts that have departed from *Swain*, moreover, have generally ruled that defense peremptory challenges are subject to

the same restrictions and judicial scrutiny on the same terms as those exercised by the prosecution.[10]

3. Contrary to the reasoning of the Second Circuit panel in *McCray*, this Court's Sixth Amendment decisions do not require and do not support abandonment of the limitations recognized in *Swain* upon defense objections to prosecutorial peremptory challenges.

a. We note, at the outset, that the "extension" of the fair cross-section principle to authorize judicial oversight of peremptory challenges is directly contrary to the admonition of this Court in *Taylor* (419 U.S. at 538) emphatically disavowing any "requirement that petit juries actually chosen • • • mirror the community" or "reflect the various distinctive groups in the population." The Court took pains to make clear that it is only "the jury wheels, pools of names, panels, or venires from which juries are drawn" that "must not systematically exclude distinctive groups in the community." *Ibid.* And the Court reaffirmed this limitation in *Duren* v. *Missouri*, 439 U.S. at 363-364 & n.20. Thus the fair cross-section doctrine developed by this Court in interpreting the Sixth Amendment provides no reason for reconsidering *Swain* v. *Alabama*, and would seem to have no application at all to peremptory challenges.

In any event, even as applied to the selection of jury venires and lists, the focus of Sixth Amendment fair cross-section jurisprudence has always been on *systematic* and recurring exclusion of the allegedly disfavored group over time in the jury selection process. See, *e.g.*, *Taylor*, 419 U.S. at 531, 538. Thus, in formulating the elements

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[10] See *Wheeler*, 22 Cal. 3d at 282 n.29, 583 P.2d at 785 n.29, 148 Cal. Rptr. at 906-907 n.29; *Commonwealth* v. *Reid*, 424 N.E.2d 495, 498-501 (Mass. 1981); *Neil*, 457 So. 2d at 487. In *Reid*, for example, the court determined that the defendant, a woman charged with murdering a man, had improperly exercised her peremptory challenges to exclude men from the petit jury and held that it was proper to disallow the challenges. In California, at least, this rule has generally resulted in more extensive voir dire examination. See *People* v. *Williams*, 29 Cal. 3d 392, 401-407, 628 P.2d 869, 872-877, 174 Cal. Rptr. 317, 320-325 (1981).

of a defendant's prima facie case in *Duren*, the Court included both the showing that "representation of this group in the venires from which juries were selected is not fair and reasonable in relation to the number of such persons in the community," and the showing that "this underrepresentation is due to systematic exclusion of the group in the jury selection process" (439 U.S. at 364). And the application of this test to the facts of *Duren* underscores the historical perspective it imports. The Court ascertained both the existence of underrepresentation (*id.* at 364-366) and the systematic nature of exclusion (*id.* at 366-367) by examining composition over an extended period of time, remarking (*id.* at 366 (emphasis added)) that Duren's "demonstration that a large discrepancy occurred not just occasionally, but *in every weekly venire for a period of nearly a year* manifestly indicates that the cause of the underrepresentation was systematic." Thus the fair cross-section doctrine provides no basis for relieving a defendant of the burden of showing consistent and systematic exclusion of black prospective jurors, if he wishes to establish impermissible use of prosecution peremptories.

b. Moreover, the argument that *Taylor* and *Duren* require abandonment of *Swain* pulls the fair cross-section doctrine loose from its moorings in the Sixth Amendment and ignores both the evolution of the cross-section doctrine and the rationale of *Swain* itself. The Sixth Amendment does not, on its face, establish any fair cross-section requirement. What it guarantees, instead, is an "*impartial* jury of the State and district wherein the crime shall have been committed" (emphasis added). To be sure, in *Taylor* the Court confirmed language in prior cases indicating that "'[t]rial by jury presupposes a jury drawn from a pool broadly representative of the community'" (419 U.S. at 530, quoting *Thiel* v. *Southern Pacific Co.*, 328 U.S. 217, 227 (1946) (Frankfurter, J., dissenting)). But, as we have shown, *Taylor* carefully distinguishes the inclusionary process of forming the jury pool from what is by nature an exclusionary

process of eliminating particular persons from service on a particular jury through the challenge system. 419 U.S. at 538.

Indeed, the importance of this distinction is confirmed by this Court's decisions in *Williams* v. *Florida*, 399 U.S. 78 (1970), and *Apodaca* v. *Oregon*, 406 U.S. 404 (1972), upholding, respectively, the authority of states to employ six-person juries and to accept nonunanimous verdicts. Each of these cases articulates the fair cross-section principle as a component of the Sixth Amendment right to jury trial. *Apodaca*, 406 U.S. at 410 (opinion of White, J.); *Williams*, 399 U.S. at 100. Yet, each case records the Court's understanding that it is the traditionally unfettered exercise of the peremptory challenge that properly limits the scope of the fair cross-section doctrine, rather than the reverse. Thus, in *Williams*, Justice White explained for the Court (399 U.S. at 102 (emphasis added)):

> Even the 12-man jury cannot insure representation of every distinct voice in the community, *particularly given the use of the peremptory challenge.* As long as arbitrary exclusions of a particular class from the jury rolls are forbidden, see, *e.g.*, *Carter* v. *Jury Commission*, 396 U.S. 320, 329-330 (1970), the concern that the cross-section will be significantly diminished if the jury is decreased in size from 12 to six seems an unrealistic one.

Similarly, in rejecting the fair cross-section objection to nonunanimous verdicts in state cases, Justice White reiterated that "[a]ll that the Constitution forbids * * * is *systematic* exclusion * * *" (*Apodaca*, 406 U.S. at 413 (plurality opinion) (emphasis added)).

c. The fair cross-section doctrine is thus but an interpolation of the Sixth Amendment right to trial by jury. It helps to clarify important aspects of that right, but does not define every facet thereof. Indeed, this conclusion is underscored by *Duren* itself, which cautions that, even with respect to the constitution of jury venires (the precise subject of the fair cross-section doctrine), the elements of the defendant's prima facie case do not

exhaust the required inquiry. Rather, demonstration of a "significant state interest" that is "manifestly and primarily advanced" by selection criteria or procedures responsible for "disproportionate exclusion" is sufficient to sustain such arrangements. *Duren*, 439 U.S. at 367-368. Accordingly, the fair cross-section standard is far from absolute or exclusive even within its proper domain. In this context, the historical and functional justifications for the relatively unfettered exercise of peremptory challenges that were found sufficient in *Swain* to "provide[] justification for striking any group of otherwise qualified jurors in any given case, whether they be Negroes, Catholics, accountants or those with blue eyes" (380 U.S. at 212), are equally sufficient to surmount challenge under the Sixth Amendment. Indeed, in light of the "very old credentials" possessed by the peremptory challenge (*ibid.*), the Sixth Amendment, which necessarily incorporates in substantial respects historical jury practices, is a far weaker basis upon which to challenge alleged abuse of the peremptory challenge system, than the Fourteenth Amendment doctrine of equal protection, the primary focus of consideration in *Swain*, which obviously was intended to overturn some aspects of prevailing state law.[11]

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[11] In reconciling the traditional peremptory challenge system with the requirements of the Sixth Amendment it is instructive to consider the accommodation made by Congress in the Jury Selection and Service Act of 1968, 28 U.S.C. 1861 *et seq.* The statute explicitly states the policy of the United States that every litigant entitled to trial by jury is entitled to a petit jury "selected at random from a fair cross section of the community in the district or division wherein the court convenes." 28 U.S.C. 1861. At the same time, the House Report makes clear that there was no intention to disturb *Swain* v. *Alabama* as it bears upon federal jury selection (H.R. Rep. 1076, 90th Cong., 2d Sess. 5-6 (1968).

> It should be noted, however, that the bill does not change the method of challenging jurors at voir dire. In particular, the bill leaves undisturbed the right of a litigant to exercise his peremptory challenges to eliminate jurors for purely subjective reasons.

While the legislative decision obviously is not controlling with respect to the proper interpretation of the Sixth Amendment, it

We note, as well, that *Swain*, while formally addressed to a claim of denial of equal protection (380 U.S. at 221), will not bear a cramped interpretation that renders it inapplicable to renewal of the same claim under the Sixth Amendment. Little if anything in the Court's analysis of a claim of discrimination founded only upon the exercise of peremptory challenges in a particular case depends on the contours of equal protection analysis or proof. Rather, as we have rehearsed (pages 9-11, *supra*), the Court's analysis rests primarily on the historical status and important contemporary functions of the peremptory challenge system. 380 U.S. at 212-222. And the practical objections to judicial scrutiny of peremptory challenges that the Court found telling (*id.* at 221-222) are equally applicable to a Sixth Amendment claim. The "radical change in the nature and operation of the challenge" (*ibid.*) that the Court foreclosed in *Swain* is no more warranted here.

Indeed, there is no reason to think that *Swain* was decided by a Court oblivious to the fair cross-section aspects of the jury trial right. In *Taylor* the Court emphasized that its decision was almost completely foreshadowed by precedent. See 419 U.S. at 526, 535. In particular citing *Smith* v. *Texas*, 311 U.S. 128 (1940), the Court observed (419 U.S. at 528 (citation omitted)) that

> [t]he unmistakable import of this Court's opinions, at least since 1940 * * * is that the selection of a petit jury from a representative cross section of the community is an essential component of the Sixth Amendment right to a jury trial.

And one of the key passages from *Smith* (311 U.S. at 130) upon which the Court relied in *Taylor* also formed

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provides substantial support for the conclusion that the relatively unfettered peremptory challenge system allowed to stand in *Swain* is consistent with the concept of a jury trial under the "American system of justice" (*Taylor*, 419 U.S. at 530). Indeed, *Taylor* itself invokes the language and legislative history of the Act in support of recognition of the fair cross-section doctrine under the Sixth Amendment. See page 12, *supra*.

part of the Court's analytical basis in *Swain*. Compare 419 U.S. at 527 with 380 U.S. at 204.

d. The point of the historical and functional review in *Swain* is that there is a substantial argument from experience that "peremptory challenge is a necessary part of trial by jury" (380 U.S. at 219). And the nub of the Court's functional analysis is that the free and unsupervised availability of peremptory challenges is an excellent method of "eliminat[ing] extremes of partiality on both sides" and "assur[ing] the parties that the jurors before whom they try the case will decide on the basis of the evidence placed before them and not otherwise" (*ibid.*). These are objectives that are fundamental to the fulfillment of Sixth Amendment right to trial by "an impartial jury." See, *e.g.*, *Patton* v. *Yount*, No. 83-95 (June 26, 1984), slip op. 11 n.12. Because the impartiality of the jury is explicitly required by the Sixth Amendment, it can scarcely be argued that an historically effective means for attaining that objective should be abandoned in deference to the fair cross-section doctrine that has been developed under the Sixth Amendment as a companion means of contributing to the same objective. There is no reason, based on currently available data, to conclude that case-specific consideration of prospective jurors' group identity characteristics in the exercise of peremptory challenges by both the prosecution and the defense will tend to bias the jury toward either acquittal or conviction. See Note, *Peremptory Challenges and the Meaning of Jury Representation*, 92 Yale L.J. 1177, 1193-1196 (1980). What ultimately matters under the Sixth Amendment is whether the jury that remains after the exercise of all challenges is impartial, not whether some or all of the persons who were eliminated by peremptory challenge would have served impartially. Thus, under a balanced and faithful reading of the Sixth Amendment, the fair cross-section doctrine should not be permitted to override the values served by unconstrained exercise of peremptory challenges, absent demonstration of a pattern of systematic exclusion of the kind condemned in *Swain*'s dictum.

e. It has been suggested, however, that "[t]he right to a jury drawn from a fair cross section of the community is rendered meaningless if the State is permitted to use several peremptory challenges to exclude all Negroes from the jury." *McCray* v. *New York*, 461 U.S. 961, 967 (1983) (Marshall, J., dissenting from the denial of certiorari). We disagree.

As Judge Garwood observed in *United States* v. *Leslie*, 759 F.2d at 393 (dissenting):

> Assuming the prosecution uses its peremptories for the purpose of prevailing in the particular case * * * the jury drawn from a venire representative of all cognizable groups, but from which one group has been eliminated by prosecution group-based peremptory challenges, generally is more likely to be acquittal prone than a jury drawn from an otherwise similar venire that excludes any members of the same group. In the latter instance, unlike the former, the prosecution could eliminate the most acquittal prone [veniremen] by using peremptory challenges it otherwise would have used to eliminate the group in question.

To put the matter another way, if one assumes the competence of the prosecutor and his desire to secure a conviction he believes to be warranted, there is an important automatic safeguard against abuse of peremptory challenges built into the system, at least where, as in Kentucky and in the federal sys em, the number of peremptory challenges available to the prosecution is not unreasonably large. As Judge Meskill explained in *McCray* v. *Abrams*, 750 F.2d at 1138 (dissenting):

> A competent prosecutor will only strike a member of the defendant's group in situations where she believes the possibility of that individual having a group bias—even if very small—is greater than the possibility of some other prospective juror having a bias. Where the group based assumption against members of the defendant's group is outweighed by some other assumption, the prosecutor will turn to the other assumptions; for instance, if a black college student is being tried in a draft registration

case, the prosecutor may prefer to challenge a white social worker than a black veteran.

We add that the competent prosecutor will also have to husband the available peremptory challenges to strike those prospective jurors who, by reason of their answers or demeanor during voir dire, suggest unreceptiveness to the prosecution's case or any idiosyncracy of personality that might "hang" a jury. Conversely, any prosecutor not blinded by racial prejudice will be cognizant that black persons are disproportionately the victims of some types of crimes (see Bureau of the Census, U.S. Dep't of Commerce, *Statistical Abstract of the United States 1985*, at 169-170) and accordingly that many black jurors, especially women and older persons, may be particularly sensitive to the importance of law enforcement.[12] The upshot is that if a prosecutor is engaged in a truly racially motivated course of striking black veniremen because they are black (and not because of any reason—however subjective—to believe that, as individuals, they are more likely to vote to acquit in a particular case), he disserves the prosecution, as well as the interests of prospective jurors—but probably not the interest of the defendant. Accordingly, there is no reason to think that judicial oversight is needed to deter such unprofessional behavior. In any event, if such behavior is nevertheless part of the regular policy of any prosecuting office, the *Swain* dictum strongly suggests that a remedy will be available.

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[12] These observations illustrate that race is only one of numerous group characteristics (such as age, sex, family status, occupation, etc.) which in combination may influence a litigant's decision whether to challenge a particular prospective juror, in the context of the characteristics of the other persons under consideration. It is particularly instructive that diversity in non-racial group characteristics has increased substantially among black persons in the United States since *Swain* was decided. For example, the percentage of black adults (25 years or older) with 4 years of high school (or more) education was 31.4 in 1970 and 56.8 in 1983. *Statistical Abstract of the United States 1985, supra*, at 136. See also *id.* at 446 (income statistics).

C. Other Criticisms Of *Swain* Are Unpersuasive

1. Two arguments not resting on the fair cross-section doctrine have also been adduced in favor of abandoning *Swain* v. *Alabama*. First, it is argued that *Swain* unjustifiably requires "several [to] suffer discrimination because of the prosecutor's use of peremptory challenges before any defendant can object" (*McCray* v. *New York*, 461 U.S. at 965 (Marshall, J., dissenting from the denial of certiorari) (footnote omitted)). Second, it is said that "the standard of proof for discrimination in *Swain* imposes a nearly insurmountable burden on defendants" (*ibid.* (footnote omitted)). We do not find these contentions persuasive.

a. *Swain*'s requirement that a defendant demonstrate a pattern of systematic exclusion or discrimination before casting upon the prosecution the burden of justifying its peremptory challenges is not an anomaly in the law. As we have indicated above (pages 18-19), it is consistent with the normal method of proving a prima facie violation of the fair cross-section doctrine. It is equally consistent with the method of proof employed when an equal protection violation is alleged. The elements of a prima facie case of discriminatory purpose are summarized in *Castaneda* v. *Partida*, 430 U.S. 482, 494 (1977) (emphasis added), where the allegation of discrimination concerned selection of grand jurors:

> [I]n order to show that an equal protection violation has occurred * * *, the defendant must show that the procedure employed resulted in substantial underrepresentation of his race or of the identifiable group to which he belongs. The first step is to establish that the group is one that is a recognizable, distinct class, singled out for different treatment under the laws, as written or as applied. *Hernandez* v. *Texas*, 347 U.S., at 478-479. *Next, the degree of underrepresentation must be proved by comparing the proportion of the group in the total population to the proportion called to serve * * *, over a significant period of time. Id.*, at 480. * * *. Finally, * * * a selection procedure that is susceptible of

abuse or is not racially neutral supports the presumption of discrimination raised by the statistical showing.

Castaneda also explains why it is that this kind of proof, establishing exclusion over a period of time, is required. 430 U.S. at 493. In order to establish a denial of equal protection proof of discriminatory purpose, rather than simply racially disproportionate impact, is required. *Washington* v. *Davis*, 426 U.S. 229 (1976). Absent proof of consistent exclusion or underrepresentation, statistics cannot provide the necessary "clear pattern, unexplainable on grounds other than race, emerg[ing] from the effect of the state action" otherwise "neutral on its face" that is necessary to make out a prima facie case of discriminatory purpose. *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252, 266 (1977). Thus, absent direct proof that the prosecution is acting on grounds of racial prejudice rather than exercising his peremptory challenges in a professional manner to strike jurors deemed least likely to be receptive to the government's case, it is entirely proper to require that a defendant challenging prosecution peremptories demonstrate, as part of his prima facie case, a consistent pattern of systematic exclusion.

b. We also find unpersuasive the argument that *Swain* makes it unduly difficult to demonstrate impermissible use of peremptory challenges even when such abusive practices are actually going on. There are cases in which such statistics have been collected and produced, albeit proof of impermissible exclusion generally has not been established.[13] And in appropriate circumstances prosecutorial officials may be called as witnesses on this subject, as the Court indicated in *Swain*. 380 U.S. at 227-228. Moreover, public defender's offices and defense counsel's

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[13] See, *e.g.*, *United States* v. *Newman*, 549 F.2d 240 (2d Cir. 1977); *United States* v. *Carter*, 528 F.2d 844 (8th Cir. 1975), cert. denied, 425 U.S. 961 (1976); *People* v. *Williams*, 97 Ill. 2d at 271-273, 454 N.E.2d at 229; *People* v. *Payne*, 99 Ill. 2d 135, 457 N.E.2d 1202, 1210-1211, cert. denied, No. 84-5330 (Nov. 13, 1984) (Simon, J., dissenting).

organizations are well situated to collect the requisite statistics. Furthermore, means can readily be devised by which court clerks could assist in preserving the necessary record as to the manner in which peremptory challenges have been exercised. Cf. 28 U.S.C. 1868. Accordingly, there is no sufficient reason to revise the elements of a prima facie case of unlawful purpose discrimination suggested in *Swain*.

2. *Swain* has also been criticized on the ground that its rationale accepts the pernicious notions that "all persons who share an attribute, such as the same skin color, will *ipso facto* view matters in the same way, and that minority groups are less able than whites to decide the case solely on the basis of the evidence" (*McCray* v. *Abrams*, 750 F.2d at 1131; see also *id.* at 1121). If *Swain* actually depended on such notions we assuredly would not advocate its continuing vitality. But we cannot agree that *Swain* accepts either of these offensive notions.

First, *Swain* does not asume that individual juror's verdicts are determined by their race or other facet of their group identity. Instead, the Court simply recognized that peremptory challenges are necessarily exercised upon very limited information and that, given the available data, it is not necessarily irrational nor reflective of racial prejudice to consider the possibility that a juror from a given distinctive group in the population may be at least marginally more likely to be disposed toward—or against—favorable consideration of a given defendant. Recognition of this possibility is not inconsistent with this Court's decisions, and indeed may be required to protect a defendant's rights. See *Ham* v. *South Carolina*, 409 U.S. 524 (1973); *Aldridge* v. *United States*, 283 U.S. 308 (1931); see also *Rosales-Lopez* v. *United States*, 451 U.S. 182, 192 (1981) (opinion of White, J.).

Moreover, when persons of all societal groups are seen to be included in the jury pool, the elimination of particular black prospective jurors in a particular case through the exercise of peremptory challenges lacks the

stigmatizing effects, implying that group's unfitness to serve or inferior status, that are one of the evils of de jure or even de facto exclusion of minority jurors from service. See *Strauder* v. *West Virginia*, 100 U.S. 303, 308 (1879). Stigmatizing effects are avoided in this context both because members of *every* distinctive group are both in theory and in practice subject to peremptory exclusion because of perceived affinity with a defendant and because the prosecutorial challenge takes place in an adversary context where it is balanced by the defendant's challenges to other prospective jurors. Thus, realistically speaking, the prosecutor's challenges in a particular case do not stand even as an implied official pronouncement respecting the relative capabilities or rights of various groups in society.[14] In addition, where, as in Kentucky and

[14] See *United States* v. *Leslie*, 759 F.2d at 392 (Garwood, J., dissenting) (emphasis in original):

> Thus, excluding a particular cognizable group from all venire pools is stigmatizing and discriminatory in several ~~a~~related ways that the peremptory challenge is not. The former singles out the excluded group, while individuals of all groups are equally subject to peremptory challenge on any basis, including their group affiliation. Further, venire-pool exclusion bespeaks *a priori* across-the-board total unfitness, while peremptory-strike exclusion merely suggests potential partiality in a particular isolated case. Exclusion from venires focuses on the inherent attributes of the excluded group and infers its *inferiority*, but the peremptory does not. To suggest that a particular race is unfit to judge in any case necessarily is *racially insulting*. To suggest that each race may have its special concerns, or even may tend to favor its own, is not. For instance, it says nothing adverse, or even truly racial, about blacks to infer that they may be more likely to have greater antipathy to the Ku Klux Klan than whites. Finally, the role played by the decision maker is significant. If the neutral structurer of the system excludes a cognizable group, the exclusion necessarily represents the official judgment of *society* that the group is generally inferior. Under the adversary framework of a trial, however, *society* is neutral; neither side is favored, neither speaks for society, each speaks only for itself. To be peremptorily challenged by one side or the other hence bespeaks a judgment which is neither societal nor even normative, but merely reflects the tactical determina-

in some federal courts, peremptory challenges are exercised simultaneously in a nonverbal fashion, the jury chosen cannot even be certain as to which party struck which veniremen.[15]

3. It is appropriate, finally, to consider the practical difficulties that would attend modification of the rule of *Swain*.

First, there would be the serious question whether defense peremptories should be comparably restricted. As the Court emphasized in *Swain* itself (380 U.S. at 219), the peremptory challenge is " 'one of the most important rights secured to the accused' " (quoting *Pointer* v. *United States*, 151 U.S. at 408). Indeed, one of the important uses of defense peremptory challenges in many cases where the defendant is black is to eliminate white jurors who are believed to harbor subtle, unacknowledged, or even unconscious bias against blacks. It is widely believed by defense counsel that challenges for cause are an insufficient protection for this purpose. J. Van Dyke, *Jury Selection Procedures* 168 (1977). Yet, a rule grossly differentiating between prosecutorial and defense use of peremptories would distort the present role of the peremptory challenge system in effectuating the constitutional requirement of jury impartiality.

The additional judicial supervision of peremptory challenges sought by petitioner would also impose unwarranted burdens on the courts. As Judge Meskill observed, dissenting in *McCray*, 750 F.2d at 1139, the logic of the Sixth Amendment analysis could be carried very far indeed: "[M]en, women, old people, young people, laborers, professionals, Democrats, Republicans, etc." may all be put forward as distinctive groups presumptively im-

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tion of one contesting litigant's counsel that the challenged person is, under the discrete facts of that particular case, more likely to favor the other side, which in the ultimate judgment of society may or may not prove to be the side of virtue and right.

[15] In the present case, the judge's exemplary courtesy in excusing the remaining members of the pool after the jury was sworn (see note 2, *supra*) further minimized any possibility of stigma.

munized from routine peremptory challenge. We need not forecast a *reductio ad absurdum* to emphasize the dramatic change such a regime would effect in the traditional peremptory challenge system.

There would also predictably be undesirable second order consequences as well. Pressure would increase for more elaborate voir dire to enable counsel to flesh out their hunches that presently underlie unexplained peremptory challenges. See page 17 note 10, *supra*. And the trial courts would be faced with the "extremely difficult task of assessing the internal motives of attorneys" (*King* v. *Nassau County*, 581 F. Supp. 493, 501-502 (E.D.N.Y. 1984)). We do not rely on the unfortunate reality that counsel would face incentives to be less than candid with the inquiring court—although that possibility must be recognized. Rather, even if counsel are scrupulous and make every effort to be candid in responding to this unfamiliar form of inquiry, it may often be difficult for counsel accurately to explain the precise motivation behind challenges to particular persons. See *Swain*, 380 U.S. at 220. Given the weakness of the affirmative argument for abandoning or revising the *Swain* rule, there is simply no sufficient reason for this Court to require state and federal courts and litigants before them to undertake the radical change proposed by petitioner.

CONCLUSION

The judgment of the Supreme Court of Kentucky should be affirmed.

Respectfully submitted.

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